Supreme Court, U.S.
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No. 93-1820

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

Petitioners,

v.

CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS CORSON, MITCHELL, TOMHAVE, & McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY and DONALD R. McKINLEY

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QUESTIONS PRESENTED FOR REVIEW

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II.

WHETHER PENNSYLVANIA'S STATUTORY PRECLUSION OF CIVIL TORT ACTIONS FOR "WRONGFUL BIRTH" FOUND AT 42 Pa.C.S. §8305(a) IS CONSTITUTIONAL RELATIVE TO THE ISSUES OF STATE ACTION, COMPELLING STATE INTEREST, DUE PROCESS AND EQUAL PROTECTION TO WOMEN?

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COUNTER-STATEMENT OF THE CASE

The instant matter arises from an action instituted by Plaintiffs in the Court of Common Pleas of Cambria County, Pennsylvania, wherein Plaintiffs asserted, inter alia, causes of action for "wrongful birth" and "wrongful

life" in connection with the birth of their daughter, Erica Lynn Sejpal. Central to Plaintiffs' claims are allegations that the Defendant medical providers did not perform medically warranted diagnostic, pre-natal exams upon the Plaintiff-mother and her fetus, nor did they provide proper genetic counselling during the course of the pregnancy, thus failing to alert Plaintiffs to the fact that their daughter would be born with Down syndrome. As a result of said circumstances, Plaintiffs have instituted suit to recover for alleged injuries occasioned by the birth of their daughter under such conditions.

In response to Plaintiffs' civil complaint, the Defendants filed preliminary objections inthe nature of a demurrer and/or motion to strike those counts which purported to set forth causes of action for wrongful birth and wrongful life. Plaintiffs countered by arguing that the statutory preclusion of similar suits as found at Title 42 Pa.C.S. §8305 was unconstitutional. Relying upon the statutes and the fundamental scope of review normally accorded properly enacted legislation, the Court dismissed those causes of action which were at issue in the preliminary objections. Moreover, the Court indicated that the statutory preclusion of wrongful birth and wrongful life tort actions was not contrary to the provisions of the United States Constitution, contrary to Plaintiffs' arguments.

The Sejpals appealed the decision of the trial court to the Pennsylvania Superior Court. The parties briefed and argued the issues brought on appeal, said issues for purposes of the attendant Petition for Writ of Certiorari limited to the constitutionality of Pennsylvania's statutory preclusion of wrongful birth and wrongful life causes of action. The appellate court ultimately ruled that Plaintiffs failed to properly preserve the aforesaid

issue for consideration, insofar as they neglected to provide proper notification to the Attorney General of Pennsylvania as required by Pa.R.A.P. 521(a). When the Commonwealth is not a party to an action wherein a statute is challenged upon constitutional grounds, the party raising the issue must notify the Attorney General's office in order to allow for his/her participation in the defense of the statute.

The decision effectively kept intact the trial court's disposition of the preliminary objections filed to Plaintiffs' causes of action for wrongful birth and wrongful life. The appellate court did not address the merits of Plaintiffs' constitutional challenges to the statutory preclusion as a result of the procedural error. The Superior Court also denied Plaintiffs' request for reargument, following of which Plaintiffs filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. This, too, was denied.

REASONS FOR DENYING THE WRIT

Petitioner assert that 28 U.S.C. §1257(a) forms the basis for jurisdiction of this Court over the issues in this matter. The Supreme Court will exercise its discretionary jurisdiction under this provision when a final judgment is rendered by the highest court of the state in which a decision could be had. However, the within Petition does not present such a matter. Rather, the issue for which Petitioners seek review was not properly preserved for consideration by the state courts, precluding a decision on the merits. Hence, a final judgment has not been rendered, thereby precluding jurisdiction of this Court over the issues presented by Petitioners.

Moreover, even assuming, arguendo, that this Court has jurisdiction over the issues presented, the decision of the trial court upholding Respondents' demurrer and finding constitutional the statutory preclusion of wrongful birth and wrongful life causes of action is correct and consistent with the applicable decisions of this Court and other courts focusing upon same. The arguments and grounds asserted by Petitioners for the exercise of this Court's discretionary jurisdiction are wholly without foundation or merit.

I.

THIS COURT DOES NOT POSSESS JURISDICTION OVER THE WITHIN ISSUES BECAUSE PENNSYLVANIA'S STATE APPELLATE COURTS DID NOT ENTERTAIN THE CONSTITUTIONAL CHALLENGE TO Pa.C.S. §8305-(a) ON ITS MERITS AS A RESULT OF PETITIONERS' FAILURE TO PROPERLY PRESERVE THE SAME FOR CONSIDERATION.

Petitioners clearly indicate in their Petition for Writ of Certiorari that jurisdiction is premised upon 28 U.S.C. §1257(a). The Supreme Court of the United States may exercise its discretionary jurisdiction over matters that are fina judgments rendered by the highest court of a State in which a decision could be had, as in such instances when the validity of a statute of any State is brought into question as repugnant to the Constitution. It is essential, therefore, that there be explicit and timely insistence in state courts that a state statute, as applied, is contrary to the dictates of the federal constitution, treaties or laws. *Rohr Aircraft Corp. v. County of San Diego,* 80 S.Ct. 1050 (1960).

In the present matter, Petitioners for the first time at the trial court level raised a constitutional challenge to

Pennsylvania's statutory preclusion of wrongful birth and wrongful life causes of action, the same of which is found at 42 Pa.C.S. §8305(a), in response to preliminary objections in the nature of a demurrer filed by Respondents to the initial complaint and said causes of action set forth therein. Prior to that time, no mention was made of a constitutional challenge to the aforesaid statutory provisions, nor was the Attorney General of Pennsylvania notified of such a challenge. The original posture of this matter was a civil tort action sounding in negligence as a medical malpractice action, the Defendants being those who may have provided care or facilities for Petitioner-Wife during her pregnancy with Erica Lynn. Petitioners did not initially raise the constitutional challenge to 42 Pa.C.S. §8305(a) through a complaint, nor was the State made a party to the within action.

Subsequent to the trial court's disposition of various preliminary objections, including the demurrer to each wrongful birth cause of action, Petitioner took an appeal to the Superior Court of Pennsylvania. There they asserted that the statutory preclusion of a civil tort action for wrongful birth was repugnant to the federal constitution and the guarantees afforded women by the Due Process Clause of the Fourteenth Amendment, insofar as the statute has a chilling effect upon a woman's right to choose an abortion. This issue, among others, was briefed and argued before a panel of the Superior Court.

Although mentioning that Petitioners' cause of action would be barred by operation of 42 Pa.C.S. §8305(a), the appellate court did not reach a final determination on the merits in this respect. Rather, the Superior Court reviewed the record and determined that the issue was not properly preserved under applicable rules of appellate

procedure so as to be before it for consideration. The Superior Court noted that the record did not reflect that the Attorney General of Pennsylvania received proper notification of a constitutional challenge to the aforesaid statute which is required by Pennsylvania Rule of Appellate Procedure No. 521(a).

As provided by Pa.R.A.P. 521(a), when the Commonwealth is not a party to an action wherein a state statute is challenged upon constitutional grounds, immediate notification in writing to the Attorney General of Pennsylvania of the existence of the question is required. A copy of the pleadings and other relevant portions of the underlying record must accompany said written notification. See, Pa.R.A.P. 521(a). The Superior Court having before it the entire certified record, however, indicated that Petitioners failed to satisfy adequately this procedural requirement, thus neglecting to preserve the constitutional challenge for appeal. See also, *Butler v. Rolling Hill Hospital,* 382 Pa.Super. 330, 555 A.2d 205 (1989).

A careful reading of the appellate court's opinion relative to the constitutional challenge to 42 Pa.C.S. §8305(a) was set forth in a conditional sense. The Superior Court did not issue an opinion that was determinative of the merits of Petitioners' constitutional challenge, as the same was not properly preserved for judicial review. As a result of Petitioners' failure to adhere to Pa.R.A.P. 521(a), the validity of Pennsylvania's statutory preclusion of a wrongful birth cause of action was not before the Superior Court for disposition. The appellate court did not address the merits, but simply considered the issue waived by Petitioners' failure as aforesaid. Since Petioners neglected to properly

preserve the issue for consideration, it too fails to be before this Court for consideration on the merits.

After the Superior Court denied Petitioners' request for reconsideration, a Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania, the State's highest court. By letter, the court indicated a per curiam decision to deny the Petition for Allowance of Appeal, thus effectively preserving the decision of the trial court disposing of the wrongful birth cause of action by operation of 42 Pa.C.S. §8305(a). This denial of further appellate review also preserved the lower appellate court's finding that Petitioners waived consideration of the constitutional challenge to 42 Pa.C.S. §8305(a) for failing to provide proper notification to the Attorney General of Pennsylvania of the constitutional challenge to a State statute.

In this context, Respondents submit that jurisdiction with the Supreme Court is now wanting. A constitutional challenge to Pennsylvania's statutory preclusion of wrongful birth causes of action was not properly preserved for appellate review during the course of the state court proceedings. Since a final decision on the merits was not rendered by the highest court of the State in which a decision could be had, this Court does not possess jurisdiction under the provisions of 28 U.S.C. §1257(a). See also, Supreme Court, Rule 10.1(c). Accordingly, this Court would act properly and in accordance with long-standing principles guiding the exercise of its discretionary jurisdiction by denying Petitioners' request for a Writ of Certiorari.

II.

A. PENNSYLVANIA'S STATUTORY PRECLUSION OF WRONGFUL BIRTH CAUSES OF ACTION, AS FOUND AT 42 Pa.C.S. §8305(a), DOES NOT IMPLICATE STATE ACTION IN THE DEPRIVATION OF A WOMAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the event that the Court determines that the within matter presents itself in a posture which makes available the exercise of its discretionary jurisdiction, a Writ of Certiorari should be denied because the trial court ultimately ruled correctly that Pennsylvania's statutory preclusion of wrongful birth causes of action is not repugnant to the federal constitution, nor is it contrary to the dictates of *Roe v. Wade,* 93 S.Ct. 705 (1973), and its progeny. In order to be a violation of these protected interests, a state must directly affect or impose a significant burden on a woman's right to choose an abortion. *Maher v. Roe,* 97 S.Ct. 2376 (1977).

Petitioners herein allege that 42 Pa.C.S. §8305(a), which precludes civil causes of action of wrongful birth, unconstitutionally interferes with her right to exercise reproductive freedom. In particular, Petitioners argue that insulating medical providers from civil liability for failing to properly inform their pregnant patients of fetal abnormalities encourages such behavior, thus creating a substantial obstacle to women who would choose to abort a fetus rather than carry it to term. Petitioners Sejpal. thus, argue that Pa.C.S. §8305(a) infringes upon the wife's right to choose abortive procedures under *Roe v. Wade,* and therefore violates her due process and equal protection rights under the Fourteenth Amendment.

To assert successfully a claim that a statute violates one's due process or equal protection rights under the federal constitutionl a party must demonstrate that state action is involved. *Shelly v. Kraemer,* 68 S.Ct. 836 (1948). Legislation which does not place an obstacle attributable to the government in the path of a woman's full reproductive freedom will not be deemed unconstitutional by the Court under its due process and equal protection analysis. *Harris v. McRae,* 100 S.Ct. 2671 (1980). The state retains the authority to enact legislation that attempts to effectuate valid interests it holds, while the same may have incidental effects that do not create an undue burden in the exercise of said reproductive freedom.

In the present matter, the allegations of negligence focus upon the medical providers' failure to perform certain diagnostic, pre-natal exams, as well as their failure to communicate information contained in other test results, thus preventing the mother from knowing that her fetus suffered from genetic abnormalities. The dearth of information allegedly prevented the mother from exercising her reproductive freedom with full information and knowledge of the circumstances attending her pregnancy. By precluding Petitioners from seeking relief through a civil tort action for wrongful birth, Petitioners argue that the State effectively encourages such behavior by insulating the medical providers from liability, and thus places a substantial obstacle in her path to choose an abortion.

However, the statutory preclusion of wrongful birth actions does not involve state action creating an obstacle to a woman's reproductive freedom. Rather, any infringement on this protected interest arises from the medical providers and not as a result of state action. As this

Court has recognized: "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 100 S.Ct. at 2688.

Moreover, the rights enunciated in *Roe v. Wade* and its progeny have been consistently interpreted in a manner recognizing that they are not universal and unqualified. *Planned Parenthood v. Casey*, 114 S.Ct. 909 (1994). State regulations that may have an incidental effect on a woman's ability to seek an abortion are not, *ipso facto*, an infringement of that right. *Id.* A statute is only improper when it creates a substantial obstacle or burden for a woman seeking an abortion; however, a state has no obligation to remove an existing obstacle that is not of its own making. *Harris, supra.* See also, *Webster v. Reproductive Health Service*, 109 S.Ct. 3040 (1989).

Although the Superior Court of Pennsylvania did not address the merits of a constitutional challenge to Pa.C.S. §8305(a) in this particular action, it has previously determined that it would be pure speculation to assume that extinguishing a civil cause of action for wrongful birth actively encourages improper behavior. *Edmonds v. Western Pennsylvania Hospital Radiology Associates*, 414 Pa.Super. 567, 607 A.2d 1083 (1992). The statutory preclusion of said cause of action also provides that medical providers will continue to be subject to licensing and disciplinary boards for making intentional misrepresentations in connection with patient care. *Id.*

The Osteopathic Medical Practice Act, 63 P.S. §271.1 *et seq.*, and the Medical Practice Act of 1985, 63 P.S. §422.1 *et seq.*, respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. These regulatory boards establish licensing procedures

for various medical providers, including physicians, and also provide that licenses can be suspended, refused or revoked for certain enumerated reasons. *Edmonds,* 607 A.2d at 1087.

Since 42 Pa.C.S. §8305(a) expressly states that it does not extend immunity or constitutes a defense to disciplinary proceedings pursuant to the aforementioned Acts, it does not encourage physicians to make misrepresentations. *Id.* Nor can it be presumed that the statutory preclusion of wrongful birth actions encourages negligent behavior. All doubts as to the constitutional integrity of a statute must be resolved in favor of the statute. *Dranzo v. Winterhalter,* 395 Pa.Super. 578, 577 A.2d 1349 (1990). The potential for professional sanctions in connection with allegations similar to those Petitioners now assert effectively takes an obstacle that may exist outside the scope of state action; hence, Petitioners' claims to violations to wife's due process and equal protection rights must fail.

In conclusion, the statutory preclusion of wrongful birth causes of action does not interfere with a woman's right to have an abortion. A woman continues to be free from obstacles when such a determination is made. The preclusion does not impose a restriction upon, or authorize action impeding a woman's right to an abortion, nor does it impose procedures which unduly burden the exercise of that right. Instead, the State legislature has simply extinguished a civil cause of action for money damages in a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. This simply fails to constitute a state-created obstacle to a woman's exercise of her reproductive freedom.

II.

B. PENNSYLVANIA'S STATUTORY PRECLUSION OF WRONGFUL BIRTH CAUSES OF ACTION, FOUND AT 42 Pa.C.S. §8305(a), PROMOTES A LEGITIMATE STATE INTEREST WHICH IS RATIONALLY FURTHERED BY THE AFORESAID LEGISLATIVE ENACTMENT.

Petitioners also argue that Pennsylvania's Wrongful Birth Statute is overly broad and fails to serve a compelling state interest. This position indirectly evokes the argument that Petitioner-wife's right to due process and equal protection under the Fourteenth Amendment is violated by 42 Pa.C.S. §8305(a). In connection therewith, Petitioners assert that the fundamental rights allegedly affected by the statutory preclusion must be subject to the highest level of scrutiny, justified only by compelling state interests which the statute is narrowly drawn to accomplish.

As aforesaid, however, the statutory preclusion of such causes of action does not amount to state action that interferes with a woman's reproductive choices. This situation is entirely different from that previously considered by the Court, as in the case of *Planned Parenthood of Central Missouri v. Danforth,* 96 S.Ct. 2831 (1976), wherein this Court held that a statute requiring spousal consent to an abortion was unconstitutional. In such an instance, the State created an obstacle whereby a husband could unilaterally prevent a woman from exercising her reproductive freedom for whatever reason, notwithstanding her desire to undergo such a procedure.

In contrast, Pennsylvania's Wrongful Birth statute does not directly create an obstacle in a woman's exercise of her reproductive freedoms. Denying Petitioners the right to bring a civil cause of action for the alleged wrongful birth of their daughter does not amount to an impair-

ment of the wife's right to secure an abortion, notwithstanding any negligence on the part of a physician who fails to inform her of the death of the fetus. See, *Dansby v. Thomas Jefferson University Hospital,* 623 A.2d 816 (Pa.Super. 1993).

Furthermore, to violate a woman's right to equal protection, a statute must discriminate against women who comprise a suspect class. Women who choose abortion, however, are not generally considered members of a suspect class. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). This Court in *San Antonio* held that a suspect class is one:

> [S]addled with such disabilities, or subjected to such history of purposeful and unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Rodriguez, 411 U.S. at 28. See also, *Maher v. Roe,* 97 S.Ct. 2376 (1977).

Since the 42 Pa.C.S. §8305(a) does not infringe on a fundamental right or suspect class through state action, the state is not required to justify the statute as furthering a compelling interest. It is only necessary that the state assert a rational basis for the statute in order for it to comport with the Equal Protection Clause of the Fourteenth Amendment. *Rodriguez, ibid.*

Although Petitioners focus upon segments of the debate surrounding Pennsylvania's Wrongful Birth Statute, it is clear under this "rational basis" analysis that the statute represents attempts to resolve concerns in a constitutional manner. The legislature desired to eliminate lawsuits to recover damages merely for the birth of a child, whether handicapped or otherwise. This

state accepted the policy that it should promote life, rather than creating an environment that promotes eugenic abortion. See, 1988 Pa. Legis. Serv. 1961 (Purdons).

The legislature also provided several persuasive reasons to support the policy furthered by 42 Pa.C.S. §8305(a). First, birth in any sense should not be considered an evil that is to be avoided. Second, these lawsuits, together with wrongful life actions, are both illogical and inconsistent. Sanctioning actions against life simply because an individual is handicapped creates a situation where those who are alive, but handicapped, are less than "normal" individuals who may be compensated for their very being.

Third, legislators should not dictate to a medical provider how to conduct his/her practice. Civil actions for wrongful birth would coerce physicians to act against their will or conscience by practicing and/or encouraging abortions. Although they are subject to professional standards by the various Acts regulating the practice of medicine, generally, the legislature should not dictate every circumstance as it regards abortions. Finally, the need to control ever increasing medical malpractice insurance warrants weighs in favor of eliminating this type of civil action. See, 1988 Pa. Legis. Serv. 2306 (Purdons).

Pennsylvania's statutory preclusion of wrongful birth actions is rationally related to the legitimate state interest in recognizing the value of human life. Said statute does not infringe upon a woman's due process or equal protection rights under the federal constitution, as well as the reproductive freedom recognized by *Roe v. Wade* and its progeny, and thus survives Petitioners' constitutional challenge. Hence, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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